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Memo

To: Whom it may concern
From: Stephen M. Bainbridge
CC: n/a
Date: 6/25/13
Re: The Case Against California Senate Bill No. 131

California Senate Bill 131 is currently pending before the California Assembly, having narrowly passed the California Senate. The bill would make dramatic changes in the statute of limitations governing certain sexual misconduct directed at children, as explained in the legislative counsel's digest:

This bill would provide that the time limits for commencement of an action for recovery of damages suffered as a result of childhood sexual abuse shall be applied retroactively to any claim that has not been adjudicated to finality on the merits as of January 1, 2014. This bill would revive, for a period of one year, a cause of action, as specified, that would otherwise be barred by the statute of limitations as of January 1, 2014, provided that the plaintiff's 26th birthday was before January 1, 2003, and the plaintiff discovered the cause of his or her injury on or after January 1, 2004.¹

I believe that SB 131 is seriously flawed, unfair, and arguably unconstitutional.

Statement of Interest

I reside in the 46th California Assembly District, where I am currently represented by Adrin Nazrian. I am a practicing Roman Catholic, who attends the Good Shepherd Catholic Church in Beverly Hills, California, but am not representing the Good Shepherd diocese, the Archdiocese of Los Angeles, or any other organization. I have not been retained by any person or organization lobbying for or against SB 131 nor have I been compensated in any way for preparing this memorandum. I have, however, generally authorized persons and organizations interested in SB 131 to make such use of it as they may deem appropriate.

By way of introduction and identification, I am the William D. Warren Distinguished Professor of Law at the UCLA School of Law.² I have written extensively on the intersection of law and

¹ Available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB131.

² UCLA affiliation disclosed solely for purposes of identification and does not imply any endorsement by UCLA or any of its affiliates.

religion, including issues relating to litigation against Catholic dioceses and other organizations arising out of the sex abuse scandals.³

Policy Considerations

SB 131 requires us to start with first principles; i.e., why do we have statutes of limitations?

Criminal statutes of limitations are laws that limit the time during which a prosecution can be commenced. These statutes have been in operation for over 350 years and are deeply rooted in the American legal system. There are several rationales underlying statutes of limitations. First, they ensure that prosecutions are based upon reasonably fresh evidence - the idea being that over time memories fade, witnesses die or leave the area, and physical evidence becomes more difficult to obtain, identify or preserve. In short, the possibility of erroneous conviction is minimized when prosecution is prompt.⁴

Civil statutes of limitations, such as those that would be eliminated retroactively by SB 131, are supported by precisely the same principle. Yet, SB 131 is clearly inconsistent with that principle. It would force defendants to deal with an unworkable legal and business climate where they face unknown liability of an unknown duration under conditions where the passage of time—30, 40 or 50 years or more—make mounting an effective defense next to impossible.

By extending the period within which suit may be brought indefinitely, and thus raising the specter of litigation based on decades-old events, SB 131 is completely antithetical to the proposition that litigation should be based on “reasonably fresh evidence.” The problem is particularly acute in the area of childhood sex abuse litigation, where so-called “recovered memories” are often at issue. As courts have recognized, the length of time between the alleged event and the recovery of the purported memory is highly relevant to the credibility of that memory, with longer time periods being associated with reduced credibility.⁵ In addition, courts have recognized that “the presence or absence of objective, verifiable corroborative evidence of the event” is critical in assessing the credibility of a recovered memory.⁶ All too many of the cases authorized by SB 131 likely will be so old that the defense may be unable to obtain evidence to challenge the credibility of purported recovered memories.

³ See, e.g., Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers, 16 Green Bag 2d 235 (2013); The Bishop’s Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal, 46 Journal of Catholic Legal Studies 65 (2007) (with Aaron H. Cole); [From Priest Abuse to Legal Abuse](#), TCS Daily, March 26, 2007; [Cafeteria Catholicism and the Minimum Wage](#), TCS Daily, January 19, 2007; [Benedict XVI](#), Tech Central Station, April 20, 2005; Catholic Social Thought and the Corporation, 1 Journal of Catholic Social Thought 595 (2004); [Those Divesting Presbyterians](#), Tech Central Station, August 2, 2004; The Bishops and the Corporate Stakeholder Debate, 4 Villanova Journal of Law and Investment Management 3 (2002); The Bishops and the Corporate Stakeholder Debate, 4 Villanova Journal of Law and Investment Management 3 (2002); Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law, 43 Villanova Law Review 741 (1998); “Nothing for Us”: Should Public Libraries Fear Religious Literature?, Liberty, March/April 1998, at 12; Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act, 21 Journal of College and University Law 369 (1994)

⁴ Lauren Kerns, Incorporating Tolling Provisions into Sex Crimes Statute of Limitations, 13 Temple Policy and Civil Rights Law Review, 325, 327 (2004).

⁵ State v. Hungerford, 697 A.2d 916, 925 (N.H. 1997).

⁶ Id.

Second, statutes of limitations encourage law enforcement officials to investigate suspected criminal activity in a timely fashion.⁷

SB 131 eliminates that incentive by eliminating the statute of limitations.

[Third,] as time goes by, the likelihood increases that an offender has reformed, making punishment less necessary. In addition, society's retributive impulse may lessen over time, making punishment less desirable.⁸

Oddly, SB 131 seeks to punish not just the actual wrongdoers, but also the organizations that employed them. As to the latter, surely the case that time lessens the justification for punishment is even more true than with respect to the actual offenders.

Finally, there is the thought that statutes of limitations provide an overall sense of security and stability to human affairs.⁹

SB 131 is particularly unfair from this perspective. Indeed, SB 131 breaks faith with assurances given by the Legislature 10 years ago when it enacted SB 1779 (Burton), a one-time, one-year lifting of the statute of limitations for all of 2003 that allowed any victim of sexual abuse—regardless of how long ago it occurred—a second chance to file a lawsuit. SB 131 thus would revive claims for an unprecedented third time.

SB 131 is further flawed by its fundamental unfairness. SB 131 covers incidents of abuse that may have taken place in private schools, not public schools, so the 92 percent of California children who attend public schools aren't covered. This discriminates against both public school children and operators of private schools. Why do public schools and teachers get a free ride, while their students get no relief and their private school counterparts face potentially staggering liability?

The financial impact cannot be ignored. As I pointed out in my law review article, *The Bishop's Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*,¹⁰ unlimited liability exposure for the Catholic Church will "impede, if not destroy, the ability of these ministries to serve the needs of their congregants. Indeed, the mere threat of liability might do so: 'Both church and society will suffer if the continuation of ministries prompted by compassion—ministries often involving risks—is stopped short by the nervous calculation of legal liabilities.'"¹¹ As such, SB 131's elimination of statutes of limitation raises serious concerns about the ability of religious organizations to freely exercise their religion and thus has very serious implications for the free exercise rights that are supposed to be protected by the First Amendment.

Possible Constitutional Considerations

Finally, I doubt whether SB 131's retroactive application can be supported in light of the U.S. Supreme Court's decision in *Stogner v. California*,¹² which held that application of California

⁷ Kems, supra note 4, at 327.

⁸ Id.

⁹ Id.

¹⁰ Stephen M. Bainbridge & Aaron H. Cole, *The Bishop's Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 48 *Journal of Catholic Legal Studies* 65 (2007).

¹¹ Id. at 99 (quoting Edward McGlynn Gaffney, Jr. & Philip C. Sorensen, *Ascending Liability in Religious and Other Nonprofit Organizations* viii-ix (1984)).

¹² 539 U.S. 607 (2003).

law, permitting prosecution for sex-related child abuse within one year of victim's report to police, to offenses whose prosecution was time-barred at time of law's enactment was unconstitutionally ex post facto. Granted, *Stogner* involved a criminal—not a civil—statute of limitations.¹³ But many of the legal arguments therein apply with equal force to civil statutes of limitation. At the very least, moreover, *Stogner's* policy arguments demonstrate that SB 131 is unwise even if it were found constitutional.

In *Stogner*, for example, Justice Stephen Breyer writing for the majority, explained that:

Long ago Justice Chase pointed out that the Clause protects liberty by preventing governments from enacting statutes with “manifestly unjust and oppressive” retroactive effects. *Calder v. Bull*, 3 Dall. 386, 391, 1 L.Ed. 648 (1798).¹⁴

The unfairness inherent in SB 131 that I have detailed above surely implicates this argument against the bill. The unfair disparate application of SB 131 to public and private organizations, plus the oppressive costs and uncertainty clearly violate the principle Justice Chase laid down.

Returning to Justice Breyer's opinion in *Stogner*, he further explained that:

Judge Learned Hand later wrote that extending a limitations period after the State has assured “a man that he has become safe from its pursuit ... seems to most of us unfair and dishonest.” *Falter v. United States*, 23 F.2d 420, 426 (C.A.2), cert. denied, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928). In such a case, the government has refused “to play by its own rules,” *Carmell v. Texas*, 529 U.S. 513, 533, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). It has deprived the defendant of the “fair warning,” *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), that might have led him to preserve exculpatory evidence.¹⁵

As we have seen, of course, the indefinite—potentially multiple decade—extension contemplated by SB 131 is equally “unfair and dishonest” and will deprive its targets of the ability to obtain a fair trial.

Conclusion

SB 131 discriminates by favoring some defendants over others and disadvantaging some plaintiffs relative to others. SB 131 unfairly unwinds the legislative bargain effectuated in SB 1779, effectively breaching faith with those who agreed to that significant extension of the statute of limitations. SB 131 would expose many private organizations to potentially devastating financial liability for actions taken years and decades before under prior administrations, thereby damaging if not destroying the ability of those organizations to serve their present day constituents. The Assembly should not pass it.

¹³ See *DeLonga v. Dioceses of Sioux Falls*, 329 F. Supp. 2d 1092, 1102 (D. S.D. 2004) (arguing that *Stogner* recognized a distinction between civil and criminal cases and that the Supreme Court has, in the past, defined a violation of ex post facto laws solely in conjunction with criminal and punitive statutes).

¹⁴ *Id.* at 611.

¹⁵ *Id.*